Petition

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NO. 81-1212

In the Supreme Court of the United States

October Term, 1981

E. B. SESSUMS AND SHARON SESSUMS,
lawful parents of the now deceased
STEVEN D. SESSUMS
and personal representatives of the estate,
Petitioners

versus

LOUISIANA POWER & LIGHT COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals, Fifth Circuit, Unit A, in applying Louisiana law which is developing under the Louisiana Civil Code, erred by refusing to stay its opinion denying the applicability of strict liability under Louisiana Civil Code Article 2317 in an electrocution by contact with an uninsulated high voltage power line, when that issue is under submission having been briefed and argued to the Louisiana Supreme Court in March 1981, but the decision of the Louisiana Supreme Court has not yet been announced.

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REFERENCE TO THE OPINIONS BELOW

The opinion of the Court of Appeals below is

reported at 652 F.2d 579 (5th Cir. 1981) and is dated August 6, 1981 and is reproduced as Appendix A to this petition. A Petition For Rehearing was timely filed and was denied per curiam dated September 21, 1981, reproduced as Appendix B to this Petition.

JURISDICTION

The jurisdiction of this Court invoked under 28 USC §1254(1).

The Judgment of the Court of Appeals, Appendix A, is dated August 6, 1981. An Order of the Court of Appeals denying petitioner's Motion For Rehearing, Appendix B, is dated September 21, 1981.

STATEMENT OF THE CASE

Petitioners, Mr. and Mrs. E. B. Sessums, brought this diversity suit for damages arising out of the death by electrocution of their 19 year old son, Steven. Petitioners alleged that the defendant power company was liable on separate theories of negligence and of strict liability under Louisiana Civil Code Article 2317. The District Court and the Court of Appeals both refused to apply the developing principals of Louisiana strict liability, Louisiana law defining strict liability under Civil Code Article 2317, notwithstanding petitioner's plea of a count of strict liability and

request for appropriate jury charges.

In reaching its determination, the Court of Appeal cited and discussed the case of *Kent v. Gulf States Utility Company,* 398 So.2d 560 (La. App. 1980) as though that case were concluded in the Court of Appeal of Louisiana, having failed to note that the Louisiana Supreme Court had granted certiorari in *Kent.* [see 398 So.2d 560 and 399 So.2d 585 (Nov., 1980)] The same issue unsuccessfully urged by petitioners in the courts below is under advisement by the Louisiana Supreme Court in *Kent,* having been argued before that Court on March 13, 1981. Petitioners, by way of Motion For Rehearing, requested that the United States Court of Appeal, Fifth Circuit, Unit A hold under advisement the Petition For Rehearing until the Louisiana Supreme Court decision in *Kent* is announced, but the Court of Appeal, in its Decision on the Petition for Rehearing, denied that request.

ARGUMENT

Since the Court's decision in *Erie R. Co. v. Thompkins*[1] in 1938, except as to matters governed by the Federal Constitution or acts of Congress, the law to be applied in a diversity case is the law of the state and the phrase, "the law of the several states" in 28 U.S.C. 1652 has referred not only to state law as enacted by the legislature, but also to the declara-

1. 304 U.S. 64

tions of state law by the state's highest court. In 1975, the Louisiana Supreme Court in the case of *Loescher v. Parr*, 324 So.2d 441 began the development of a stream of jurisprudence which imposes strict liability under Louisiana Civil Code Article 2317 for that which is caused by things which we have in our custody if the thing is such as to present an unreasonable risk of harm. Before the trials in the District Court and in the Court of Appeal, the Louisiana Supreme Court had not had before it a case requiring consideration of the application of this developing theory of strict liability to uninsulated power line electrocution cases. Petitioners submit that the Court of Appeal should have known that *Kent v. Gulf State Utilities Company* was pending before the Louisiana Supreme Court at the time it rendered its decision and that rather than to have speculated as to what the Louisiana Supreme Court's decision would be in such a case, the Court of Appeal should have deferred its decision or stayed its consideration of petitioners Application For Rehearing pending the Louisiana Supreme Court's decision in *Kent*.

WHEREFORE petitioners pray that this Petition For Certiorari be granted and that the Court of Appeals, Fifth Circuit be ordered to stay final judgment in the instant case pending action by the Loui-

siana Supreme Court in *Kent v. Gulf States Utilities Company.*

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have served a copy of the above and foregoing Petition For Certiorari to all counsel of record this the 18TH day of December, 1981 by placing same in the United States Postal Service postage prepaid.

Carl J. Schumacher, Jr.

Appendix A

E. B. SESSUMS and Sharon Sessums, Etc., Plaintiffs-Appellants

v.

LOUISIANA POWER & LIGHT COMPANY, et al., Defendants-Appellees.

No. 80-3423.

United States Court of Appeals
Fifth Circuit.
Unit A

Aug. 6, 1981.

Plaintiffs brought action to recover damages for death by electrocution of their son occurring when antenna he was attempting to dismount touched power line. The United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., rejected plaintiffs' proffered jury charges on strict liability and entered judgment for defendant on jury verdict which failed to find defendant negligent in any regard, and plaintiffs appealed. The Court of Appeals, Gee, Circuit Judge, held that under Louisiana law,

trial court did not err in its rejection of strict liability theory of recovery.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHARLES CLARK and GEE, Circuit Judges, and SPEARS*, District Judge.

GEE, Circuit Judge:

Plaintiffs, Mr. and Mrs. E. B. Sessums, filed this Louisiana diversity case to recover damages for the death by electrocution of their nineteen-year old son Steven. Several months before his fatal accident, Steven Sessums had helped his fiance's family, the Dunhams, erect above their home a citizen's band antenna (the commercially produced antenna was extended to a total length of about 45 feet by attachment to the end of an iron pipe and aluminum mast). Care was taken at the time of installation to insure that the antenna was kept clear of overhead power lines running across the back of the Dunham property approximately 22 feet above ground. Later in helping to dismount this same antenna, young Sessums was

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* District Judge of the Western District of Texas, sitting by designation.

killed when it touched the power line in being lowered. Originally named as defendants in this wrongful death action were Louisiana Power & Light (the utility company), Tandy Corporation (the manufacturer of the CB antenna), and Nelson Dunham, on whose property the accident occurred.

Settlement was reached before trial between plaintiffs and defendant Dunham and his insurer. A summary judgment was granted Tandy; plaintiffs' interlocutory appeal from that summary judgment was denied; and Tandy is now out of the case. Plaintiffs' case against the power company went to trial before a jury, where they asserted that Louisiana Power & Light was liable on theories of negligence and of strict liability, under judge rejected plaintiffs' profered jury charges on strict liability under article 2317 of the Civil Code.[1] The trial judge rejected plaintiffs' proffered jury charges on strict liability, , with assumption of the risk as the sole defense to the article 2317 action. The case was submitted on the negligence theory alone to the jury, which failed to find the utility company negligent in any regard. The trial judge

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1. Article 2317 reads: "We are responsible, not only for the damage occasioned by our own act, but for that which is by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications." The "modifications" are to be found in the several sections of the code immediately following article 2317; none is here applicable.

entered judgment for defendant on that verdict, and plaintiffs timely filed this appeal.

[1] Plaintiffs' sole complaint on appeal is that the district judge erred in refusing to submit to the jury their requested issue on article 2317 strict liability. Our only task, then, is to determine whether the current state of Louisiana law on the liability of power companies for accidents on or about power lines required the submission of a strict liability issue. For the reasons assigned below, we find that the trial court did not err in its rejection of that theory of recovery.

Until recently, it was clear that in Louisiana a utility bore responsibility in such circumstances only for the results of its negligence. *See Sonier v. Louisiana Power & Light Co.*, 293 So.2d 24 (La.App.1974); *Gros v. Louisiana Power & Light Co.*, 288 So.2d 364 (La.App.1974). The duty imposed on electric utilities was a heavy one, however, that of exercising the utmost care to avoid accident or injury. While more burdensome than the general negligence standard, a breach of that duty of utmost care still required a showing of fault, a showing not necessary for imposition of strict liability. The cases providing the clear answer that a utility's only possible liability lies in negligence, while quite recent, antedate the recogni-

tion in Louisiana of a strict liability action under article 2317. Their continued validity is thus not without doubt; our consideration of the development and current state of strict liability law in Louisiana, however, convinces us that their message remains essentially intact.

[2] In 1975, with its decision in *Loescher v. Parr*, 324 So.2d 441 (La. 1975), the Louisiana Supreme Court first recognized a claim for strict liability in tort based on article 2317 of the Code. It there laid out the requisites for recovery: successfully to assert this cause of action, plaintiff had to prove "(a) that the thing . . . which caused the damage was in the care (custody) of the defendant owner, (b) the defect or vice [of the thing], and (c) that his damage occurred through this defect or vice." *Id.* at 449. The "vice" is that which poses an "unreasonable risk of injury to another." *Id.* at 446-47. Once these elements are proven by plaintiff, defendant can escape liability, only by showing that the injury was caused by the fault of the victim;[2] fault of a third person; or irresistible force. The possible applicability of these defenses to the facts of this case was not explored at trial, since the threshold question of strict liability was submit-

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2. Fault in this context being solely assumption of the risk. *See Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980).

ted to the jury.[3]

As the doctrine is enunciated in *Loescher,* there are several elements of proof for the successful assertion of strict liability. A key inquiry, which defeats plaintiffs here, is that for an injury-producing "defect" or "vice" in the object. Plaintiffs are unable to point out any *defect* in defendant's "thing" (be it the power line or the electrical current itself) that posed an unreasonable risk of harm. The height of the wires (22 feet above ground); their location (parallel to and four feet within the back boundary of the Dunham property); that they were uninsulated; that no warning was posted that they were energized—these are all common and, in some instances, unavoidable practices in the industry (admittedly no certain ground for denial of strict liability) and have not been found, in Louisiana or elsewhere, to constitute *unreasonable* danger.[4] Plaintiffs are certainly correct in saying that

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3. The decedent's behavior, in light of his apparent awareness of the danger of working around power lines as evidenced by his participation in the earlier, cautious effort to raise the antenna, might have presented a close question on assumption of the risk, had such an inquiry been necessary.

4. With particular reference to the alleged failure to warn of the energized state of these wires, *see Cates v. Beauregard Electric Cooperative, Inc.* 328 So.2d 367, 370 La.1976): "Electric wires on a pole are an announcement of danger to almost anyone smart enough and old enough to get himself in contact with a wire 28 feet above the ground."

electricity itself is dangerous; but the *unreasonable* character of that danger is not apparent and has not been demonstrated.

The question of defect or vice under article 2317 is not without ambiguities that prevent a cursory rejection of plaintiffs' arguments. In *Marquez v. City Stores,* 371 So.2d 810 (La.1979), the Louisiana Supreme Court affirmed a judgment for plaintiff in an article 2317 action in the face of the failure of anyone, court or party, to point to a specific defect or vice in the damaging instrument. A small child's foot was wedged between a step and the sidewall of a department store escalator, causing him serious injury. *Marquez* can be read to allow the presumption of defect from the fact of injury itself. "The fact that this escalator caught the child's shoe is an unusual occurrence in itself which would not have happened had the escalator not been defective." *Id.* at 813. "If this escalator were safe for small children with small feet, then James' shoe could not have been caught in this opening." *Id.* at 814.

Plaintiffs adopt a similar approach before this court: "The very fact that the decedent was electrocuted in this manner evidences the unreasonably dangerous quality of these things within LP&L's custody." But *Marquez* is distinguishable. Clearly, a correctly designed, manufactured, and operated escalator does not catch the feet of small children. It

would not be unreasonable for Louisiana law, if it did so in *Marquez*, to accept and apply a theory akin to res ipsa loquitur, familiar as a negligence principle, in a strict liability context. *But for* a defect, whatever it might have been, *Marquez* may hold, there could have been no crippling injury. If this be a principle of Louisiana law, it is inapplicable here. Electrocution resulting from laying a metal object across a live wire is not an "unusual occurrence," *see Marquez*, 371 So.2d at 813; it will happen every time. There was no defect in the electricity; it behaved exactly as it must, seeking ground through the nearest conductive object.

Plaintiffs made no legally cognizable claim of any specific defect or vice in the electric current or the wire. Accepting their arguments requires accepting the notion that electricity itself, or perhaps the provision of electricity to residential areas through overhead lines, is unreasonably dangerous. Such a holding would make utilities the insurers against harm of those who come into contact with structurally sound power lines in normal operation. The law of Louisiana does not now require this approach; and whether public policy would be better served by acceptance of plaintiffs' position is not here our proper inquiry.

Despite the decision in *Loescher v. Parr, supra*, the current Louisiana authority indicates that power company liability in Louisiana must rest on a showing of negligence. In *Simon v. Southwest Louisiana Electric Membership Corp.*, 390 So.2d 1265 (La.1980), a more recent case with somewhat similar facts to this (victim's electrocution following contact of metal piping with overhead power line), the Louisiana Supreme Court reiterated that the duty owed by a utility was one of utmost care and that liability was based in negligence. "We agree with the court of appeal that operators of power lines are not required to anticipate every possible accident which may occur and are not the insurers of safety of persons moving around power lines in the course of everyday living." *Id.* at 1268. There was, admittedly, no direct discussion of article 2317 as an alternate basis of liability in *Simon*. That plaintiff did not assert such a theory would not prevent a Louisiana appellate court from considering its applicability for the first time on appeal. *See, e.g., Jones v. City of Baton Rouge*, 388 So.2d 737 (La.1980)[5]. That strict liability was considered and rejected as a possible ground of recovery by the court

5. In *Jones* plaintiffs sued on the negligence theory under art. 2315 of the Code. Both the court of appeal, in reversing the trial court judgment for defendant and awarding plaintiffs damages, and the Supreme Court, in affirming that disposition, relied on art. 2317 as the basis for liability.

can be inferred from the dissent's resort to that theory as the proper response to the facts of that case. 390 So.2d at 1269—70.[6]

In its assertion that imposition of article 2317 liability on electric utilities is an accepted doctrine of Louisiana law, plaintiffs point to two recent court of appeal cases dealing with electrocution injury or death. One of these, *Kent v. Gulf States Utilities Co.*, 398 So.2d 560 (La.App.1980), was decided before the supreme court's *Simon* opinion. The second, *Hebert v. Gulf States Utilities Co.*, 395 So.2d 832 (La.App.1981), followed the supreme court pronouncement. Neither of the cases *holds* what plaintiffs would have us hold: that electric utilities are strictly liable for contacts with power lines and that it is error to fail to submit that ground of liability to the injury for its consideration. In both *Kent* and *Hebert* the state trial judges did include a section 2317 charge to the juries; the court of appeal decisions do not endorse or accept that charge as mandatory or even as correct. Rather, the opinions take the instructions and consequent verdicts as given and then proceed to find that plaintiffs'

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6. In urging that strict liability was the proper measure for defendant's conduct, the dissent in *Simon* itself made clear that "Slemco's [the utility's] 'hot' line did not, in and of itself, pose an unreasonable risk of injury." 390 So.2d at 1270. That is basically plaintiffs' position here, however, that Louisiana Power & Light's "hot" power line was itself unreasonably dangerous.

"fault" would bar recovery for defendants' negligence or strict liability.

Plaintiffs' requested instructions are not statements of current Louisiana tort law. Litigants whose success depends on securing substantive innovations in state law must address their arguments for them to state courts; such departures are not for us. *Rhynes v. Branick Manufacturing Corp.*, 629 F.2d 409 (5th Cir. 1980). For the reasons discussed above, we find the trial court's rejection of the strict liability jury instruction correct. The judgment below is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 80-3423

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filed: Sept. 21, 1981

E.B. SESSUMS and
SHARON SESSUMS, ETC.,

Plaintiffs-Appellants,

versus

LOUISIANA POWER & LIGHT
COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING
(September 21, 1981)

Before CHARLES CLARK, and GEE, Circuit Judges, and SPEARS*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/ Thomas Gibbs, Jr.
United States Circuit Judge

* District Judge of the Western District of Texas, sitting by designation.

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

MAY IT PLEASE THE COURT:

The respondent, Louisiana Power & Light Company, respectfully requests that this Court deny the plaintiffs' Petition for Writ of Certiorari seeking

review of the Opinion of the United States Court of Appeal, Fifth Circuit, that is reported at 652 F.2d 579.

STATEMENT OF THE CASE

This lawsuit was commenced by the plaintiffs in Federal District Court, Eastern District of Louisiana, against Louisiana Power & Light Company. The plaintiffs' lawsuit was for the alleged wrongful death of their son based on an action in tort or *ex delicto.* Jurisdiction of the Federal District Court was based upon diversity of jurisdiction between the plaintiffs and the defendant, Louisiana Power & Light Company.

The accident sued upon occurred when the plaintiffs' decedent was removing a CB antenna from Nelson Donham's house and hit an overhead electric power line located at the rear of the property approximately 37 feet from the house. The CB antenna that the plaintiffs' decedent was handling at the time of the accident was extended to a total length of about 45 feet by an attachment to the end of an iron pipe and aluminum mast.

At the trial of the case, the evidence showed that the overhead electric power line was located entirely within its right of way and servitude [easement] and that the line complied with and exceeded the

clearances prescribed by the National Electrical Safety Code. The plaintiffs failed to show any defect in the overhead electric power line.

The Federal District Court refused to grant the plaintiffs' alternate jury instruction for strict liability and rejected the plaintiffs' argument that the mere existence of the overhead electric power line created an unreasonable risk of harm under the law of Louisiana.

On the jury's finding that Louisiana Power & Light Company was not negligent, the Federal District Court rendered judgment in favor of Louisiana Power & Light Company and against the plaintiffs, dismissing their complaint

The United States Court of Appeal, Fifth Circuit, in affirming the Federal District Court, correctly found that under the facts of this case current Louisiana law indicates that liability in Louisiana of an electric utility company must rest on a showing of negligence in accordance with the decision of the state's highest court, the Louisiana Supreme Court, in *Simon v. Southwest Louisiana Electric Membership Corp.*, 390 So.2d 1265 (La. 1980).

REASONS WHY THE WRIT SHOULD BE DENIED

The plaintiffs' petition filed with this Court does not present any special or important reasons for the granting of same as indicated by Rule 17 of this Court dealing with its jurisdiction on writ of certiorari.

The plaintiffs' contention here is merely that this Court should grant a writ of certiorari to hold the judgment and decision in this case in abeyance until the Louisiana Supreme Court decides *Kent v. Gulf States Utility Company* involving an unrelated electrical accident. We respectfully submit that the plaintiffs' contention does not form a proper basis for jurisdiction on a writ of certiorari.

In a diversity action the Federal District Court must instruct the jury on the current Louisiana law as it properly did in this case. We do not believe that it is proper for the plaintiffs to now ask this Court to hold this case in abeyance on the basis of the plaintiffs' speculation that the Louisiana Supreme Court may change the law.

The plaintiffs elected to file and pursue their lawsuit in the Federal District Court rather than in the state court, and the outcome of their lawsuit was

properly determined in the Federal District Court under existing Louisiana law. The United States Court of Appeals, Fifth Circuit, aptly stated in its decision in this case, as follows:

> Plaintiffs' requested instructions are not statements of current Louisiana tort law. Litigants whose success depends on securing substantive innovations in state law must address their arguments for them to state courts; such departures are not for us. *Rhynes v. Branick Manufacturing Corp.*, 629 F. 2d 409 (5th Cir. 1980). For the reasons discussed above, we find the trial court's rejection of the strict liability jury instruction correct. [652 F.2d at 583]

CONCLUSION

For the reasons expressed above, the respondent, Louisiana Power & Light Company, prays that the plaintiffs' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that a copy of the above and foregoing Brief in Opposition to the plaintiffs' Petition for Writ of Certiorari has been served upon the plaintiff's counsel of record:

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by mailing same to them through the United States Postal Service, postage prepaid, on this 12th day of January, 1982.

New Orleans, Louisiana.

Eugene G. Taggart